Statement of Jacqueline C. Charlesworth

Before the Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate

"How Does the DMCA Contemplate Limitations and Exceptions Like Fair Use?"

July 28, 2020

Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

My name is Jacqueline Charlesworth. I am an attorney in private practice, where I represent songwriters and artists, and am privileged to be a board member of Songwriters of North America ("SONA"), a grassroots organization that advocates on behalf of music creators. Previously, I served as General Counsel and Associate Register of Copyrights at the U.S. Copyright Office. Thank you for the opportunity to address the question of fair use in relation to the DMCA and, in particular, the use of music by political campaigns.

Fair Use Principles

Free speech is a core value of our nation. The Framers understood that copyright protection, as well as free speech, could and should live side by side, and enshrined this understanding in the Constitution, in Article I[1] and the First Amendment,[2] respectively.[3] As the Supreme Court has explained, the Framers understood copyright to be the "engine of free expression."[4]

Unquestionably, politicians, no less than others, must be able to exercise their rights of free speech, including by making fair uses of copyrighted works. In focusing on the interests of political speakers, however, we must not forget that creators, too, are intended beneficiaries of the First Amendment. Songwriters and performing artists express themselves through music. When a song is taken and used by a campaign without permission, the creator's message is appropriated and altered, and he or she is forced to participate in someone else's speech, contrary to First Amendment values.[5]

---

[1] "The Congress shall have Power … To promote the Progress of Science … by securing for limited Times to Authors … the exclusive Right to their … Writings." U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 101.
[2] U.S. Const. amend. I.
[3] "The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles." *Eldred v. Ashcroft*, 527 U.S. 186, 219 (2003).
[4] *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985).
[5] *Id.* at 559-60 (First Amendment "shields the man who wants to speak or publish when others wish him to be quiet," but also provides a "concomitant freedom *not* to speak publicly …. [C]opyright … serve[s] this countervailing First Amendment value.").

Our copyright law balances the interests of creators and users through the doctrine of fair use, codified in section 107 of the Copyright Act.[6] A claim of fair use by a politician or political campaign must be evaluated, like any other, under the four-factor test prescribed by Congress in section 107.[7] The most important factors to be considered are the purpose of the use—including, under the Supreme Court's guidance in *Campbell v. Acuff-Rose Music*, whether it is "transformative"—as well as the impact of the use on the existing or potential market for, or value of, the work used.[8]

Contrary to what some may believe, there is no wholesale exception from ordinary rules of copyright for political uses. Nor could there be: a blanket exemption for any use deemed "political" would quickly swallow much of copyright.[9]

A great song can be used to sell candidates and causes, no less than cars or computers. In this age of YouTube and TikTok, music is included in videos to capture and hold the attention of online viewers, and the videos are used to generate ad revenue and paying subscribers, as well as to sell merchandise. A political campaign that is not well advised on copyright issues may not stop and think before adding a famous song to liven up a video that promotes their candidate or denounces an opponent.

It is important to understand that, in such a case, although the song may have been "transformed" in a literal sense by being attached to a video, that does not make the taking "transformative" for purposes of fair use analysis.[10] To qualify as "transformative," the use of a copyrighted work must add new insight or meaning, or have some critical bearing on the original.[11] When a song is merely used, in the words of the Supreme Court, "to get attention or to avoid the drudgery in working up something fresh," it is unlikely to qualify as a fair use.[12]

---

[6] 17 U.S.C. § 107 (fair use of a copyrighted work for purposes such as criticism, comment, news reporting or scholarship not an infringement of copyright). As the Supreme Court has explained, fair use is a "built-in First Amendment accommodation[]" that provides "breathing space within the confines of copyright." *Eldred v. Ashcroft*, 527 U.S. 186, 219 (2003); *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. 569, 579 (1994). The Copyright Act also protects free speech interests through the idea/expression dichotomy, which excludes ideas—as opposed to expression—from protection. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea … regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[7] *See* 17 U.S.C. § 107. In assessing questions of fair use, courts are to consider (1) the purpose and character of the use, including whether it is for commercial or nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the potential market for or value of the work. *Id.*

[8] *Campbell*, 510 U.S. at 578-79, 590.

[9] As the Supreme Court has observed, "[a]ny copyright infringer may claim to benefit the public" by disseminating someone else's work. *Harper & Row*, 471 U.S. at 569.

[10] *See Henley v. DeVore*, 733 F. Supp. 2d 1144, 1158, 1163-64 (C.D. Cal. 2010) (where political campaign "borrowed heavily" and made only "minimal changes" to plaintiffs' songs, candidate's uses were not transformative or fair use); *see also Browne v. McCain*, 612 F. Supp. 2d 1125, 1130-31 (C.D. Cal. 2009) (refusing to dismiss songwriter's infringement claim for use of song in campaign ad on fair use grounds).

[11] *Campbell*, 510 U.S. at 578-79.

[12] *Id*. at 580.

In my experience, songwriters and artists whose works are used without permission in this manner are usually far less concerned about partisan politics than the fact that a part of their life's work has been appropriated for an unintended purpose. Such a use associates the creator and his or her expressive work with a particular politician or cause, which can alienate fans who hold different political views and adversely impact future paid licensing opportunities, as advertisers tend to shy away from songs associated with any other product or cause. In other words, the unauthorized use undermines the market for and value of the song, which is contrary to a finding of fair use.

A campaign that seeks to use a song in a promotional video can always approach the copyright owner for a license. If a license is not obtained, that does not mean the video cannot include music. A wide variety of "pre-cleared" music, in many genres, is available for use in online videos through stock licensing services at relatively modest cost.

DMCA Concerns

Turning to the DMCA takedown regime in particular, in my observation, the current system imposes unjust burdens on creators and small copyright owners, who are often one-person shops without adequate tools or resources at hand when a political ad containing their song suddenly appears on multiple online platforms.

By way of example, a client of mine wrote and owns a song, registered with the Copyright Office, that for decades has been licensed and used as an inspiring anthem by a major sports association, and serves as a primary source of income for this songwriter and his family. Upon discovering that the song had been used as the soundtrack for an attack ad, he dutifully sent compliant DMCA notices to YouTube and Twitter, but the ad was not taken down. Indeed, YouTube responded with an email accusing him of "fraud," demanding further "evidence" not required under the DMCA, and suggesting that he should retract his request or risk termination of his YouTube account. He had to hire a licensing administrator with access to YouTube's ContentID system, as well as me, before this damaging ad was finally removed.

Fortunately for my client, the campaign did not respond with a counter notice asserting an unfounded claim of fair use, which is not uncommon. If it had, under the DMCA's "put-back" provision, my client would have had to file a federal lawsuit within ten business days to prevent this harmful ad from being reposted, an extraordinary burden that very few creators can manage or afford.[13]

[13] *See* 17 U.S.C. § 512(g)(2) (copyright owner must seek court order restraining the infringer to avoid reposting of content).

Public Performance Licensing

Although this hearing is focused on fair use issues relating to the DMCA, as many of the news headlines concerning the political use of music relate to the playing of music at live campaign events, it may be useful to distinguish those situations from situations where songs are used in promotional videos and campaign ads.

To play music at a live public event, a campaign needs a public performance license from one or more performing rights organizations (or "PROs"), the largest of which are ASCAP and BMI. Both ASCAP and BMI have well over ten million works in the repertoires, and each offers a blanket-style political campaign license that allows the campaign to make use of their respective catalogs. The license is not specific to a particular venue, but follows the campaign from event to event.

To accommodate creators' objections regarding the use of their works in political contexts, these campaign licensing agreements allow PRO members to notify the PRO that they wish to withdraw their songs from the license, in which case the PRO alerts the campaign of the songs to be excluded. It is my understanding that such notifications are not very common, and the vast majority of the repertoire—many millions of songs—remains available to the campaign to play at their events. Under this approach, the licensee has the benefit of a broad, blanket license for live events, as well as clarity regarding any songs that are not authorized for use.[14] These licenses represent a balanced solution that respects the interests of both creators and politicians.

Thank you, Senators, for your ongoing attention to issues surrounding the DMCA. I would be happy to answer any questions you may have.

[14] It is important to recognize that the PRO license covers live performances of music only; a separate license is needed from music copyright owners to record an event at which music is played and/or to post such a recording online.